Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 88.

CHARLES H. NUTTING, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF MASSACHUSETTS.

IN ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

REPLY BRIEF.

J. HORLEY ANDREW,
Of Counsel for Plaintiff in Error.

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THE COMMONWEALTH OF MASSACHUSETTS.

Brief in Reply for Plaintiff in Error.

I.

The brief submitted by the learned Attorney General of Massachusetts fails to meet the proposition in the brief for the plaintiff in error that the provisions of the act of 1894 under which this prosecution was instituted, as framed, are not a constitutional exercise of the power of the State to prevent unauthorized foreign insurance companies from doing business within its limits, and to prevent the citizens of the Commonwealth from contracting with such companies within its jurisdiction, except by the observation on page 5 of the brief that the

act "does not pretend to prevent or make it criminal for a resident of the State to insure his property in whatever company he may desire," and the further observation in a sentence on page 6 of the brief that "the liberty of the citizen to make contracts of insurance *outside* of the State is not attempted to be abridged, but the liberty of an insurance agent to solicit insurance business for companies without the State is made a criminal offence."

Clearly, the legislature by this act purported to make it unlawful and criminal for the citizens of the State to contract either within or without the State for the insurance of their property with unauthorized foreign insurance companies, unless and except as expressly permitted to do so by the act (sections 3, 98). That is the very essence of the legislation.

The only exception to the rule of the act is found in *section 83*, which permits the licensing of persons specially to effect a particular kind of insurance, namely, "*fire* or *bombardment* insurance on property in this Commonwealth in foreign insurance companies not authorized to do business in this Commonwealth," upon the stringent terms and conditions prescribed in that section. The citizen before receiving such a license must prove that he is unable to procure in companies admitted to do business in the State, the amount of insurance necessary to protect his property, and he can only procure insurance under the license after he has procured insurance in companies admitted to do business in the State to the full amount such companies are willing to write on his property.

By *section 84* foreign companies admitted to do business in the State are authorized to make insurance contracts on

property therein, "*only* by lawfully constituted and licensed resident agents," and cannot make such contracts by their agents in the State or country of their legal domicile.

Before the enactment of the Massachusetts insurance act of 1887, c. 214, § 3, if insurance was made by a foreign insurance company without complying with the requisitions of the statute, the *contract* was declared *valid* by statute, while a penalty of $1,000 was imposed upon the making of the same (Pub. Sts., c. 119, § 200; Gen'l Sts., c. 58, § 72; Hartford Ins. Co. *vs.* Matthews, 102 Mass., 221).

The act of 1887 made the contract itself illegal, as does the act of 1894.

The statute, as observed in regard to the Louisiana act of 1894 in the *Allgeyer case*, is not only an apparent but a real interference with the right of the citizens "to place insurance on property of their own wherever and in what company they desired," and is not justified "for the purpose of upholding what the State says is its policy with regard to foreign insurance companies which had not complied with the laws of the State for doing business within its limits" (165 U. S., 588, 589). And as said in that case, the insurers did no business within the State, and the contract was not therein made.

II.

The Commonwealth while deeming it unimportant to discuss the question whether the locus of the insurance contract in this case was within or without the State, submits that the contract is to be construed as made within the State (p. 4).

This cannot well be maintained, we suppose, in a Massachusetts case, in view of the judgment of the highest court of that State in *Commonwealth Mutual Insurance Company vs. Knabe Manufacturing Company* (171 Mass., 265), cited at length in the brief for the plaintiff in error (pp. 39–41).

The decision in that case is also clear to the point that Mr. Nutting, although an insurance broker, cannot be deemed or treated as the agent for any purpose of the British underwriters who executed the Lloyd's policy in this case.

If the policies issued by the Massachusetts company, plaintiff in that case, on the property of the Maryland company, were Maryland contracts, the policies were confessedly illegal and void, as made by the plaintiff in violation of the law of Maryland. The Supreme Judicial Court of the State reached its conclusion in favor of the legality and validity of the policies as Massachusetts contracts by holding that all the *insurance brokers* through whom the contracts were procured from the plaintiff, could be regarded only as the agents of the defendant company who obtained the insurance.

It is also clear under the decision of the Supreme Judicial Court of Massachusetts in *Commonwealth Mutual Insurance Co. vs. Wood* (171 Mass., 484) that the insurance by the London Lloyds on the property of Mr. McKie, in Boston, did not involve the doing of any *business* by those underwriters in Massachusetts.

In reply to the defense in that case that the Massachusetts company was not authorized or licensed to do business by some of the States of the Union in which it incurred losses on property insured in those States, the court deemed it

sufficient to say, "the *business* of the company was conducted *in this State*, and the contracts were valid here."

III.

It is said in the brief for the Commonwealth that the act of 1894 "only makes it an offense for an agent or broker to negotiate or in any manner aid in the transaction of insurance with a foreign insurance company not admitted to do business in Massachusetts. It is the doing of such acts which is in terms charged in the indictment" (p. 5).

We do not so understand the act or the indictment.

Section 3 says it shall be unlawful for "any person *as insurance agent or insurance broker*, to make, negotiate, solicit, or in any manner aid in the transaction of such insurance, unless and except as authorized under the provisions of this act"; but the section carries with it no penalty against the person who "as insurance broker" violates that prohibition.

As has been seen, the penalty sought to be enforced against Mr. Nutting is that denounced in *section 98* against "any person who shall act in any manner in the negotiation or transaction of unlawful insurance," &c.; and the indictment is against him as a person who, at the city of Boston, on November 18, 1898, for Mr. McKie, negotiated with and procured to be issued by certain underwriters the Lloyd's policy on Mr. McKie's vessel in Boston, upon which the prosecution was founded.

As has also been said, Mr. Nutting is not indicted for any alleged unlawful acts done by him "as insurance agent or insurance broker," and is not charged with negotiating, or

soliciting, or aiding in the transaction of the Lloyd's policy "as insurance agent or insurance broker;" and it is clear under the agreed facts that the particular acts done by him in the matter of that foreign insurance upon which the conviction was based, were *not* performed by him "as insurance agent or insurance broker," but were performed by him ministerially and solely as a person who was the agent or servant of Johnson & Higgins and McKie, and under and pursuant to his lawful employment as such agent or servant.

He was convicted of the offense charged in the indictment by the enforcement against him of the unconstitutional mandate in *section 3*, by which the judicial courts were obliged to treat this foreign contract made *outside* of the State, as a domestic contract made in Boston, for the purpose of subjecting him to the penalty imposed in *section 98* of the act.

IV.

The Commonwealth finally relies implicitly upon the *Hooper case;* but, we submit, in the language of the court in the *Allgeyer case*, "the facts of that case and the principle therein decided are totally different from the case before us" (165 U. S. 588).

The conviction in the *Hooper case*, as has been said, was based (1) upon a constitutional statute of California, which, as this court declared, undertook to do no more than make it an offense for a person to procure *in the State* insurance for a resident in an unauthorized insurance company (2) upon a contract made in the State by such an unauthorized company.

"The words, '*who in this State*,' cannot be read out of the law in order to nullify it under the Constitution." (155 U. S. p. 656.)

As stated in the brief for the State in the *Hooper case*, "until the rate of premium was assented to by Mott, and the policy in the China Mutual Company accepted by him, there was no completed contract, and Mott could not have been compelled to take the contract offered to him."

This court said that the Fourteenth Amendment "does not guarantee the citizen the right to make within the State, directly or indirectly, a contract the making whereof is constitutionally forbidden by the State." (155 U. S., 658.)

But the Fourteenth Amendment *does* guarantee the citizen the right to make such a foreign contract as that involved in this case, and no State legislature can constitutionally forbid the making of it, directly or indirectly.

That portion of the opinion of the learned court in the *Hooper case* relied on by the Commonwealth, in which it is said, "if it (the insurance) were obtained for the resident by a broker who was himself a resident, this would be a procuring within the State and be covered by the statute," was an answer, as we understand, to the strenuous contention for Hooper that the fact that the New York company had no authorized agent in California, excluded "the *possibility* of the insurance having been *procured* within the State;" and the meaning of the court clearly was that if the insurance were obtained *within the State* for a resident by a broker, himself a resident, this would be a "*procuring*" within the State covered by the statute, although the foreign company had no agent as such in California.

The insurance *was* obtained by Hooper for Mott within the State, where the contract was accepted and the premium paid to Hooper for the company by Mott.

The court never meant to say, as we suppose, that because a person happened to be by occupation an insurance broker, he could be dealt with criminally for any acts whatever done by him in respect to a foreign insurance contract made and completed through others out of the State, just as if he had in fact negotiated or effected the contract as an agent of the underwriters within the State.

V.

This court is not concluded by what is said in the opinion of the court below in respect to the meaning of the term "unlawful insurance," as used in *section 98* and in the indictment.

In *Yick Wo vs. Hopkins* (118 U. S., 356, 366) the supreme court of California had expressed its clear opinion in regard to the meaning and effect of the legislation there in question, but this court, speaking by Mr. Justice Matthews, said:

"That, however, does not preclude this court from putting upon the ordinances of San Francisco an independent construction; for the determination of the question, whether the proceedings under these ordinances and in enforcement of them are in conflict with the Constitution of the United States, necessarily involves the meaning of the ordinances, which, for that purpose, we are required to ascertain and adjudge. We are consequently required to differ from the supreme court of California upon the real meaning of the ordinances in question."

VI.

But whatever meaning and effect is given to *section 98* of the act of 1894, the statute as applied and enforced in this proceeding against Mr. Nutting, by reason of the acts performed by him in the matter of the foreign insurance contract upon which the indictment is based, impaired his rights, as well as those of Mr. McKie, the assured, under the Constitution of the United States.

No business was done by the London Lloyds in Massachusetts, no contract was therein effected by them, the contract in question was not subject to the laws or jurisdiction of the State, the plaintiff in error was not an agent or representative in fact or law of the English underwriters, and what he did could not be made the subject of criminal punishment by the Legislature without violating the rights and securities guaranteed to him, as well as Mr. McKie, by the Fourteenth Amendment, as maintained in the brief in this case.

As this court, speaking by Mr. Justice Harlan, in *Minnesota vs. Barber* (136 U. S., 319), has said: "There may be no purpose upon the part of a legislature to violate the provisions of that instrument, and yet a statute enacted by it, under the forms of law, may, by its necessary operation, be destructive of rights granted or secured by the Constitution. In such cases, the courts must sustain the supreme law of the land by declaring the statute unconstitutional and void." But the intended ultimate effect of the legislation under review, as enforced against the plaintiff in error, in this case, is to deprive the citizens of the right to contract outside of the State for the insurance of their property—a right

which State legislation cannot impair. The legislation, therefore, is not due process of law as applied to any citizens of the State, and cannot be justified by the acknowledged right of the Commonwealth to enact such legislation in the legitimate exercise of its police or other powers as to it may seem proper. In the exercise of such right, this court has declared, "care must be taken not to infringe upon those other rights of the citizen which are protected by the Federal Constitution" (*Allgeyer vs. Louisiana*, 165 U. S., 591).

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